

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CECILIA NEFF TEEL, CATARINA
M. MARTINEZ and ELISABETH
ADAMS,

Plaintiffs,
vs.

HORIZON/CMS HEALTHCARE
CORPORATION; f/n/a HORIZON
HEALTHCARE CORPORATION
d/b/a CASA MARIA CARE CENTER,

Defendant.

No. 97-00790 PK/LCS

MEMORANDUM OPINION AND ORDER

THIS MATTER comes on for consideration of Defendant's Motion for Summary Judgment on Plaintiff Elizabeth Adam's [sic] ADA Claims filed April 15, 1998 (doc. 30), Defendant's Motion for Summary Judgment on Plaintiff Teel's ADA Claims filed April 15, 1998 (doc. 32), Defendant's Motion for Summary Judgment on Plaintiff Elizabeth Adam's [sic] Claims as Untimely filed April 15, 1998 (doc. 34), and Defendant's Motion for Summary Judgment on Plaintiff Martinez's ADA Claims filed April 15, 1998 (doc. 36). The court will temporarily defer ruling on the motions pending substantive responses by Plaintiffs.

The deadline in this case for submitting motion packages in accordance with D.N.M.LR-Civ. 7.3(a)(5), was April 15, 1998. See Initial Pre-Trial Report filed October 20, 1997, at 19 (doc. 12). Although an extension of time was sought until April 30, 1998, it was denied by the magistrate judge in view of the upcoming pretrial conference on June 1, 1998. See Order filed March 30, 1998 (doc. 26). On April 1, 1998, Defendant hand delivered or faxed¹ the above motions to Plaintiffs. Defendant then filed the motions on April 15, 1998, without responses explaining that "we have been told by Plaintiff's [sic] counsel that they are being mailed to us today." Ltr. dated April 15, 1998 to Clerk (lodged in correspondence section of file). Apparently, Plaintiffs filed their responses on April 15, 1998. See Docs. 38, 39, 40 & 41.

Plaintiffs responded not on the merits, but rather on the grounds that the Defendant's motions should be stricken because they should have been served by March 15, 1998 in order to allow time for responses and replies to be completed by April 15, 1998. Plaintiffs contend that Defendant's service of the motions on April 1 is in disobedience of the magistrate judge's order denying the extension of time. Plaintiffs request that the court strike Defendant's summary judgment motions and supporting materials.

Provided service of the motions was not by mail, see Fed. R. Civ. P. 6(e)

¹ Plaintiffs do not raise objections based upon the manner of service.

(extending time to respond to a pleading by three days when party being served with pleading is served by mail), the Defendant could serve its motions on April 1 and still comply with the April 15 deadline, see D.N.M.LR-Civ. 7.6(a) (response due within 14 calendar days of motion), although a reply is probably not possible within the deadline. The failure to oppose a summary judgment motion under D.N.M.LR-Civ. 7.5(b)² constitutes consent and Fed. R. Civ. P. 56(e) provides that if an adverse party fails to respond, “summary judgment, if appropriate, shall be entered against the adverse party.” Given the court’s clear preference for a resolution on the merits, Plaintiffs will be given additional time to respond. Plaintiffs shall file with the court substantive responses to Defendant’s motions and do so promptly, by Tuesday, April 28, 1998. Given the lateness of Defendant’s motions, Defendant has waived the right to reply.

² 7.5 Form of Motion

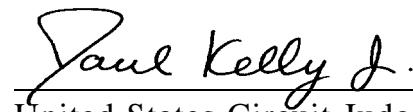
. . . .

(b) Failure to Serve or File Brief or Response. Failure to serve (or file, if required by these rules) a brief in support of any motion constitutes consent to deny the motion. Failure to serve (or file, if required by these rules) a response in opposition to any motion constitutes consent to grant the motion.

Plaintiffs' request to strike Defendant's motions is denied.

IT IS SO ORDERED.

DATED this 23rd day of April, 1998 at Santa Fe, New Mexico.



United States Circuit Judge
Sitting by Designation

Counsel:

Donald Sears, Jr. and Steven K. Sanders, Albuquerque, New Mexico, for Plaintiffs.

Cindy Lovato-Farmer and Jim Dines, Dines, Wilson, Gross & Esquivel, P.C., Albuquerque, New Mexico, for Defendant.